

**STATE OF INDIANA  
BEFORE THE INDIANA ALCOHOL & TOBACCO COMMISSION**

<b>IN THE MATTER OF</b>	)	
<b>THE PERMIT OF:</b>	)	
	)	
<b>FREEDOM OIL LLC</b>	)	
<b>D/B/A FREEDOM EXPRESS #3</b>	)	<b>PERMIT NO. DL50-26235</b>
<b>211 W. CENTER STREET</b>	)	
<b>BOURBON, INDIANA 46504</b>	)	

**Applicant**

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

**I. BACKGROUND OF THE CASE**

Freedom Oil LLC, d/b/a Freedom Express #3 ("Applicant"), 211 W. Center Street, Bourbon, Indiana, 46504, permit #DL50-26235, appears pro se by Gregory J. Cobb, its managing member, and is the Applicant for a new Type 115<sup>1</sup> Alcohol and Tobacco Commission ("ATC" or "Commission") beer and wine permit. The application was assigned to the Alcoholic Beverage Board of Marshall County ("Local Board"). The Local Board held a hearing on October 6, 2009 ("LB Hearing") and voted three (3) to one (1) to deny the application. The ATC adopted the Local Board's recommendation on October 20, 2009, at its regular public meeting.

The Applicant filed a timely Notice of Appeal and the matter was assigned to ATC Hearing Judge E. Edward Dunsmore ("Hearing Judge"). An appeal hearing was held on December 17, 2009 ("Appeal Hearing") and at that time, witnesses were sworn, evidence was received and the matter was taken under advisement. The Hearing Judge, having read the typed transcript of the LB Hearing, the evidence submitted to the ATC during the Appeal Hearing, and the contents of the entire ATC file, as well as having taken official notice of the same as well as the codes and standards adopted by this state, now tenders his Findings of Fact and Conclusions of Law to the Commission for its consideration.

**II. PROCEDURAL HISTORY**

1. On August 10, 2009, Applicant filed its Application for a New or Transfer Permit.
2. On October 6, 2009, the Local Board held a hearing and voted three (3) to one (1) to deny the application.
3. On December October 20, 2009, the ATC adopted the Local Board's recommendation.

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<sup>1</sup> Beer and wine (grocery) dealer located in an incorporated area. Ind. Code 7.1-3-5-2(a).

4. On November 3, 2009, the Applicant timely filed its request for administrative review and request for appeal hearing within the fifteen (15) day deadline required by 905 IAC 1-36-2.
5. Ramona Keller filed an Objection and Petition for Intervention on November 8, 2009, pursuant to 905 IAC 1-36-2.
6. An Order denying the Remonstrator's Objection and Petition for Intervention was entered on November 20, 2009.
7. On December 17, 2009, the Hearing Judge conducted a hearing regarding the Applicant's appeal.

### **III. EVIDENCE BEFORE THE LOCAL BOARD**

- A. The following individuals testified before the Local Board in favor of the Applicant in this case:

1. Gregory J. Cobb, Managing Member of Freedom Oil LLC.

- B. The following individuals testified before the Local Board against the Applicant in this cause:

1. Ramona Keller, Remonstrator and local citizen.

- C. The following evidence was introduced and admitted before the Local Board in favor of the Applicant in this cause:

None.

- D. The following evidence was introduced and admitted before the Local Board against the Applicant in this cause:

1. Petition against approval of the permit with names and addresses of twelve (12) people, including Remonstrator Ramona Keller.

### **IV. EVIDENCE BEFORE THE COMMISSION**

- A. The following individuals testified before the Commission in favor of the Applicant in this cause:

1. Gregory J. Cobb, Managing Member of Freedom Oil, LLC

- B. The following individuals testified before the Commission against the Applicant in this

cause:

None.

- C. The following evidence was introduced and admitted before the Commission in favor of the Applicant in this cause:

None.

- D. The following evidence was introduced and admitted before the Commission against the Applicant in this cause:

None.

## **V. FINDINGS OF FACT**

1. Freedom Oil LLC, d/b/a Freedom Express #3 (“Applicant”) located at 211 W. Center Street, Bourbon, Indiana 46054, is an applicant for an ATC type 115 beer and wine permit, permit #DL50-26235. (ATC File)
2. Applicant is an Indiana LLC, in existence since March 6, 2002, and is authorized by the Indiana Secretary of State to conduct business in the state of Indiana. (ATC File)
3. Applicant has six (6) stores and two of them have alcohol permits. Neither of them has had any violations. (LB Hearing)
4. Applicant has operated this store in Bourbon for seven (7) years. (LB Hearing)
5. The Bourbon store sells groceries and gasoline. (LB Hearing)
6. The store manager has been an employee of the LLC for ten (10) years. The assistant manager of the store has been an employee for four (4) years. Two of the clerks have been employees of the store for two (2) or three (3) years. (LB Hearing)
7. No evidence was presented to indicate that the proposed permit premises are located within 200 feet of a church or school. (LB Hearing; ATC File; Appeal Hearing)
8. The Bourbon store is a large enough business that alcohol sales will not overtake the sale of other items such that alcohol sales will be less than 25% of all items sold on the premises, excluding gasoline and automotive oil products (LB Hearing; ATC File)
9. Applicant sells an average of \$100,000 per month worth of groceries and an average of 40,000 gallons of gasoline. (Appeal Hearing)
10. The Town of Bourbon has one liquor store, one tavern and an American Legion that sell liquor. The Family Dollar sells some groceries. (LB Hearing)

11. Applicant is seeking the permit to allow for one stop shopping for the citizens and customers of Bourbon. (LB Hearing)
12. The closest other cities/towns to Bourbon are Plymouth (9 miles) and Warsaw (10 miles).
13. There is a grocery store permit available in Bourbon per quota. (LB Hearing; ATC File)
14. No evidence was presented that Applicant does not have a fine reputation. (LB Hearing; Appeal Hearing)
15. No businesses appeared at the LB Hearing to remonstrate against Applicant. (LB Hearing; Appeal Hearing)
16. One individual appeared at the LB Hearing to remonstrate against the granting of Permit #DL50-26235 to Applicant. No remonstrators appeared at the appeal hearing. (LB Hearing; Appeal Hearing)
17. There was no evidence or testimony that the Applicant herein was not qualified to hold the permit applied for, nor was there sufficient testimony to deny the permit at this particular location. (LB Hearing, Appeal Hearing, ATC file)
18. Any finding of fact may be considered a conclusion of law if the context so warrants.

#### **IV. CONCLUSIONS OF LAW**

1. The ATC has jurisdiction over this matter pursuant to Ind. Code 7.1-1-2-2; Ind. Code 7.1-2-3-9.
2. The permit application was properly submitted pursuant to Ind. Code 7.1-3-1-4.
3. The ATC is commissioned to act upon proper application. *Id.*
4. The Hearing Judge conducted a *de novo* review of the appeal on behalf of the ATC, including a public hearing. 905 IAC 1-36-7(a); Ind. Code 7.1-3-19-11.5
5. The Hearing Judge may consider as evidence all documents in the ATC File, including the transcript of proceedings and exhibits before the Local Board. 905 IAC 1-36-7(a)
6. The Hearing Judge may also consider as evidence any codes and standards that have been adopted by an agency of this state. 905 IAC 1-36-8(e)
7. Evidence at the hearing was received in accordance with the Indiana Administrative Code and the Commission's rules. The findings here are based exclusively upon the substantial and reliable evidence in the record of proceedings and on matters officially noted in the proceeding. 905 IAC 1-37-11(e); Ind. Code 4-21.5-3-27(d)

8. Freedom Oil LLC, d/b/a Freedom Express #3, permit #DL50-26235, is an applicant for an ATC Type 115 beer and wine permit.
9. The proposed permit premises is not in a residential district as referred to in Ind. Code 7.1-3-19-13 and 905 IAC 1-18-1.
10. The proposed permit premises are more than two hundred feet (200') from a church or school. Ind. Code 7.1-3-21-11
11. The Commission may issue a beer dealer's permit to an applicant who is the proprietor of a grocery store. Ind. Code 7.1-3-5-2(a)
12. The term "grocery store" means a store or part of a store that is known generally as a convenience store or food mart and is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks. Ind. Code 7.1-1-3-18.5 (a)(2)(B)
13. Freedom Oil LLC d/b/a Freedom Express #3, has established that the Bourbon store is a convenience store or food mart which is primarily engaged in the retail sale of automotive fuels and the retail sale of a line of goods that include milk, bread, soda and snacks.
14. Freedom Oil LLC d/b/a Freedom Express #3, is a fit and proper applicant, has maintained a reputation for decency and law obedience, and is well qualified to hold an alcoholic beverage permit under Indiana law. 950 IAC 1-27-1; Ind. Code 7.1-3-19-10
15. Freedom Oil LLC d/b/a Freedom Express #3, is of good moral character and in good repute in the community in which it does business, and is qualified to hold the permit it seeks. 950 IAC 1-27-1; Ind. Code 7.1-3-4-2(a)(2)(A)
16. The Applicant is not disqualified from holding an ATC beer and wine grocery permit. Ind. Code 7.1-3-4-2; Ind. Code 7.1-3-5-2; Ind. Code 7.1-3-15-2
17. In determining whether to issue a permit, the Commission may consider the geographic desirability of the proposed permit location, the need for the permit at the proposed location, the community's desire for the permit, and the impact of the permit on the community and other businesses. 905 IAC 1-27-4
18. The Commission may consider both a need and desire for the permit in determining whether a permit should be issued in a particular matter. *Id.*
19. "Need" means whether the services are available at the location or in some close geographic proximity. 905 IAC 1-27-4(a)
20. "Desire" means whether individuals would purchase those products at that location, if they were available. 905 IAC 1-27-4(b)

21. A determination of whether there exists a need and desire for the services at the location in question turns on the facts of each case. *Id.*
22. Where an Applicant shows that customers would be willing to purchase alcoholic beverages if they were available for sale, such evidence constitutes a desire to receive such services at that location. 905 IAC 1-27-4(b)
23. There is no other permit store in Bourbon that would allow for one stop shopping for groceries, beer and wine. (LB Hearing, Appeal Hearing)
24. The Applicant has proven that there is a need for a beer and wine grocery permit at the Applicant's location. 905 IAC 1-27-4(a)
27. The Applicant has proven that the neighborhood and community desire to receive the services of an alcoholic beverage permit at the Applicant's location. 905 IAC 1-27-4(b)
28. All laws shall be general and administered with uniform application throughout the State. *Ind. Constitution*, Art. IV, Sec. 23; See also, *Indiana Alcoholic Beverage Commission v. Osco Drug*, 431 N.E.2d 823, 830 (Ind. App. 1982)
29. Freedom Oil LLC, d/b/a Freedom Express #3, has submitted substantial evidence that it is qualified to hold an ATC Type 115 beer and wine grocery permit.
30. No evidence was submitted which would disqualify Applicant from holding a Type 115 beer and wine grocery permit at its Bourbon store location.
31. The beer and wine permit at the Bourbon store will not negatively impact other businesses in the neighborhood or community.
32. To deny Applicant's application, while granting other similarly situated applicants' applications, would be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. Ind. Code 7.1-3-19-11
33. The Local Board denied this application without sufficient evidence that would support a finding that this permit should not be issued.
34. The law is with the Applicant and against the Remonstrator at the LB Hearing.
35. The initial findings of the Local Board were: 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law; 2) contrary to a constitutional right, power, privilege, or immunity; 3) in excess of, or contrary to, statutory jurisdiction, authority, limitations or rights; 4) without observance of procedure required by law; or 5) unsupported by substantial evidence. Ind. Code 7.1-3-19-11
36. Because there was no substantial evidence against the issuance of this permit at either the LB Hearing or the Appeal Hearing, for the Hearing Judge to deny this application would not be supported by substantial evidence.

Therefore, it is ORDERED, ADJUDGED AND DECREED that the finding of the Local Board to deny this application was not based on substantial evidence and must fail.

It is hereby further ORDERED, ADJUDGED AND DECREED that the evidence produced at the Appeal Hearing was in favor of the Applicant, and the appeal of Freedom Oil LLC, d/b/a Freedom Express #3, for this Type 115 permit, Permit # DL50-26235, is granted, and the permit applied for at its Bourbon store location is hereby GRANTED.

DATED:

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E. Edward Dunsmore  
Hearing Judge